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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1476

J. W. BATESON COMPANY, INC., *et al.*, *Petitioners*

v.

UNITED STATES OF AMERICA FOR AND ON BEHALF OF THE BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND, *et al.*, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

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BRIEF OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed on behalf of The Associated General Contractors of America (AGC) with the written consent of all parties in this case.

The AGC is a voluntary trade association, in existence for more than sixty years, with approximately 8500 members, the overwhelming majority being small business contractors. Its membership is composed of general contractors dedicated to the purpose of im-

proving the professional standards of the construction industry and the skill, integrity and responsibility of its member firms, which are engaged throughout the United States in all phases of construction work on federal, state and private projects.

The AGC is interested in all federal statutes relating to construction, remodeling or repair of public buildings or public works of the United States, and particularly the interpretation and application thereof by the courts affecting the obligations and responsibilities of the members as prime contractors, as principals on performance and payment bonds executed by them, and as indemnitors of their sureties on those bonds. Thus, AGC is vitally interested in any extension of vicarious liability or responsibility on construction projects, statutory or decisional, which may have the effect of overburdening its members.

THE FACTS

The facts sufficiently appear in the record, and need not be repeated. Suffice it here to recount that J. W. Bateson Company, Inc., was the prime contractor with the United States for the construction work; Pierce Associates, Inc., was a subcontractor of Bateson; Colquitt Sprinkler Company, Inc., was a subcontractor of Pierce—a sub-subcontractor as to Bateson; respondent Road Sprinkler Fitters Local Union No. 669, UA, had a contract with Colquitt, and respondent trustees are the trustees of the Employee Fringe Benefit Trust Funds established by the Collective Bargaining Agreement to which Colquitt was a party. The recovery sought and allowed respondents was for fringe benefit funds and union dues withheld by Colquitt.

ARGUMENT

The Court of Appeals Failed to Recognize That the Reforms of the Miller Act, Which Superseded the Heard Act, Were Expressly Designed to Facilitate Prompt Payment by Providing a Limitation Upon the Class Entitled to Sue on the Bond, with Safeguards Against the Risk of Double Payment.

The decision and judgment of the Court of Appeals used the earlier and different Heard Act standards as to the entitlement to recovery without seeming to recognize its deficiencies and the dissatisfactions respecting it which inhibited prompt payment, although safeguarding against double payment. In doing so, the Court of Appeals did not take into account the reforms of the Heard Act made in the Miller Act, emphasizing and facilitating prompt payment to those within the purview of the Act, with, however, safeguarding limitation of the class to which the right of action was afforded, and notice and limitation period for suit, all to enable the contractor safely to make payment promptly to its subcontractors without the hazard of later double payment. (Decision reported in 551 F.2d 1284.)

The Heard Act (1905)—Its Deficiencies

It seems desirable to treat the Heard Act[1] briefly, in order to give the setting for the Miller Act and to delineate the policy considerations and the reasons for its enactment with the provisos contained in Section 2a (40 USC 270b). Although the Heard Act required a bond containing an obligation that the contractor should promptly make payments to all persons supply-

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[1] Set forth in footnote 1 in *U.S. ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 160 (1914).

ing him with labor and materials in the prosecution of the work provided for in the prime contract, nevertheless in practice no such prompt payment could be made and far too frequently was not made. The bond required by the statute was a combined performance and payment bond, with the right in the United States as the obligee, first to satisfy its demands should the contractor default both in performance of the contract and in the payment of labor and material claims.

Moreover, six months had to elapse after "final settlement" occurred between the contractor and the United States to allow time for the United States to bring suit if it had a claim on the bond. The determination of "final settlement" was itself productive of much litigation and delay. *Illinois Surety Co.* v. *U.S.*, 240 U.S. 214 (1916); *Globe Indemnity Co.* v. *U.S.*, 291 U.S. 476 (1934); *United States Casualty Co.* v. *District of Columbia*, 71 App. D.C. 92, 107 F. 2d 652 (1939), under the District of Columbia counterpart of the Heard Act (decision per Rutledge, Associate Justice).

If no suit was brought by the United States on the bond, then, after six months from the date of final settlement, an action might be brought by a claimant, the initial suit being called the instituting creditor's suit, and all others were required to intervene so that the action was to be prosecuted as a single action and all obtained an enforcible judgment at one time. *Miller* v. *American Bonding Co.*, 257 U.S. 304 (1921); *Arnold* v. *U.S.*, 263 U.S. 427 (1923). Thus, the unpaid excavating subcontractor could not get paid any sooner than the unpaid roofer.

The Heard Act was held not to be limited in allowing recovery down the vertical line from the subcontractor

so that a sub-subcontractor, sub-sub-subcontractor, etc., could recover on the bond. *Hill* v. *American Surety Co.*, 200 U.S. 197 (1906); *MacEvoy* v. *U.S.*, 322 U.S. 102, 104-106, and footnotes 2, 3 and 4 (1944).

Nevertheless, even the Heard Act had its limitations on the right of recovery, e.g., *Hardaway* v. *National Surety Co.*, 211 U.S. 552 (1909), financing the contractor; *U.S.* v. *Standard Surety & Casualty Co.*, 32 F. Supp. 836 (1940), denying recovery for insurance premiums on workmen's compensation and employer's liability policies.

Moreover, in *U.S. ex rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157, 162 (1914), this Court, after remarking that the right of action on the bond was created in favor of certain creditors of the contract; that the cause of action did not exist before and was the creature of the statute, said:

> "The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well settled principles the limitations upon such liability become a part of the right conferred and compliance with them is made essential to the assertion and benefit of the liability itself."

Payment in full by a contractor to his subcontractor was not a defense under the Heard Act. *Mankin* v. *U.S.*, 215 U.S. 533 (1910). Nevertheless, the hazard of double payment was avoided in the Heard Act by the necessity of prosecuting all claims in one action in

one court so that adjustments could be made at the various levels.[2]

Thus, the Heard Act's liberal allowance of recovery as above outlined suffered from the serious defect of not only militating against prompt payment, but also of undue delay in payment with expensive litigation often resulting. *MacEvoy* v. *U.S., supra,* footnote 4.

The Miller Act

In order to remove the abuses which the Heard Act generated and permitted, the Miller Act was enacted in 1935, the pertinent part of which is as follows (40 USC 270b):

"§ 270b. Same; rights of persons furnishing labor or material

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefore before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

"Aug. 24, 1935, c. 642, § 2, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279."

Aside from the provisions in the Miller Act for separate performance and payment bonds, eliminating the conflict between the United States and the creditors in cases of default in performance as well as in payment of the contractor's obligations under the bond,

[2] If the contractor owed a subcontractor $200,000 and the latter owed his subcontractor $100,000 and the last in turn owed his subcontractor $50,000, the adjustments would be made accordingly, so no duplication of payments would result to the contractor.

the essential reforms made by the Miller Act are contained in the provisos to which the Court of Appeals has not really given effect,[3] and in subsection (b) of Section 2a.

Furtherance of prompt payment was the dominant Congressional policy, which, however, in the light of the realities of the commercial world, to be achieved needed both as a spur and as careful, specific safeguards against the hazards thereof, the elements in the provisos and in the last paragraph of the Act, all which are conditions of the right to sue and built-in to the remedy:

1. The 90 days' notice to the prime contractor by those who had contracts with a subcontractor.

2. Cut-off at the designated levels or limitation of right to sue to subcontractors and to those having express or implied contracts with subcontractors.

3. Cut-off of the right to sue by requiring that such action be brought within one year after performing of the last of the work or furnishing the last of the material for which the claim was being made.

4. Confining all actions on the particular bond to the court having jurisdiction over the place where the prime contract was to be performed, thus further facilitating consolidations of cases and adjustments.

[3] The House Report, No. 1263, 74th Cong., 1st Sess., is printed in the Exhibit to this brief. The Senate Report, No. 1238, simply submitted as its report the House report.

The Notice Provision of the Act

The provision requiring a sub-subcontractor or a supplier to a subcontractor to give notice[4] of his claim to the contractor is obviously necessary both to encourage prompt payment and to make it possible safely to pay or to deduct appropriately from the subcontractor's payment. The notice is for the benefit of the prime contractor and is a condition of liability. *U.S.* v. *Kelley*, 327 F. 2d 590 (CA9, 1964); *U.S.* v. *H. I. Lewis Const. Co.*, 375 F. 2d 194 (CA2, 1967); *U.S.* v. *Freethy*, 469 F. 2d 1348 (CA9, 1972); House Report, *supra*.

The Class Entitled to Sue and to Recover

The Congressional policy, by the express terms of the Miller Act and by the clear intention of Congress expressed in the House and Senate Reports, confines the right of action to a subcontractor and to those having contracts, express or implied, with a subcontractor. It would be absurd to require the notice only by those who had contracts with a subcontractor, i.e., a subcontractor or a supplier of materials to a subcontractor, if more remote persons could sue and recover, without such notice. The House Report, *supra*, stated:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond."

The Courts of Appeals and the District Courts have given effect to the limitation of the class to which the right of action was created and confined by the Miller

[4] Not necessarily by registered mail. See *Fleisher Eng. & Const. Co.* v. *U.S.*, 311 U.S. 15, 17-18 (1940).

Act and to the intention of Congress in that regard. *U.S.* v. *Hartford Accident and Indemnity Co.*, 376 F. 2d 811 (CA1, 1967); *U.S.* v. *Frederick Raff Co.*, 271 F. 2d 415 (CA1, 1959); *U.S.* v. *United States Fidelity & Guaranty Co.*, 422 F. 2d 597 (CA4, 1970) *Elmer* v. *United States Fidelity & Guaranty Co.*, 275 F. 2d 89 (CA5, 1960), *cert. den.*, 363 U.S. 843 (1960); *Fidelity and Deposit Co. of Maryland* v. *Harris*, 360 F. 2d 402 (CA9, 1966); *U.S.* v. *Blount Bro. Constr. Co.*, 168 F. Supp. 407, 411 (D. Md. 1958); *U.S.* v. *Deschenes Constr. Co.*, 188 F. Supp. 270, 272 (D. Mass. 1960); *Whitmore Oxygen Co.* v. *Idaho Crane & Rigging Co.*, 193 F. Supp. 802, 803 (D. Idaho 1961). The one exception, other than the court below in the instant case, seems to be *McGregor Architectural Iron Co.* v. *Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323 (D. Pa. 1957).

MacEvoy, supra, was a rejection of an urged extension of the Act and of Congressional policy, wherein a claim of a person supplying materials to a materialman of a contractor with the United States was denied, the Court deciding that a materialman was not a subcontractor. The Court said (322 U.S., at 107) that it could not "disregard the limitations on liability which Congress intended to impose and did impose in the provisos of Sec. 2(a) [of the Miller Act, 40 USC 270b]." The Court reiterated that principle in *U.S.* v. *Carter*, 353 U.S. 210, 216, allowing recovery, however, because the contract of the Union was directly with the contractor, Carter. See also, *Aetna Cas. & Sur. Co.* v. *U.S.*, 382 F. 2d 615 (CA5, 1967), and *U.S.* v. *Wright Contracting Co.*, 194 F. Supp. 444, 448 (Chesnut, J., D. Md. 1961, commenting on the necessity of a complete reading of *MacEvoy*).

The One-Year Provision of Section 2(b) of the Miller Act (40 USC 270(b)) is Itself Also a Limitation Upon Liability.

The rule or principle established by this Court in *U.S.* v. *McCord, supra,* that the one-year period was a limitation of liability and a condition of the right to sue by private claimants under the Heard Act, was carried over into the Miller Act Section 2(b) comparable provision. *Fleisher Eng. & Contr. Co.* v. *U.S.*, 311 U.S. 15 (1940); *U.S.* v. *Montgomery*, 253 F. 2d 509 (CA3, 1958); *U.S.* v. *Western Casualty & Surety Co.*, 359 F. 2d 521 (CA5, 1966); *U.S.* v. *Home Indemnity Co.*, 489 F. 2d 1004 (CA7, 1973); *U.S.* v. *Edward R. Marden Corp.*, 289 F. Supp. 141 (D. Mass., 1968).

From the foregoing, it may be seen that the notice, limitation of class of persons afforded a right of action on the payment bond, and the one-year provision, all have been authoritatively held to be conditions of liability and of the right to maintain a suit on the Miller Act bond.

The Court of Appeals, in Misconceiving *MacEvoy* and *F. D. Rich*, Contravened in Its Opinions and Judgment the Remoteness Proviso of Section 2(a) of the Act.

MacEvoy, the prime contractor, bought building materials from Miller, who in turn purchased them from Tompkins. While MacEvoy had paid Miller in full, the latter's payment to Tompkins left an unpaid balance. The issue was whether Tompkins, who had supplied materials to a materialman on a Government contract, could recover under the Miller Act.

After remarking that the Act should be liberally construed and applied properly to effectuate the intent

of Congress, the Court specifically cautioned (322 U.S. 108-110):

> "But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. Ostensibly the payment bond is for the protection of 'all persons supplying labor and material in the prosecution of the work' and 'every person who has furnished labor or material in the prosecution of the work' is given the right to sue on such payment bond. Whether this statutory language is broad enough to include persons supplying material to materialmen as well as those in more remote relationships we need not decide. Even if it did include such persons we cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of § 2(a). However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' D. Ginsburg & Sons v. Popkins, 285 US 204, 208, 76 L ed 704, 708, 52 S Ct 322, 19 Am Bankr Rep(NS) 589.
>
> "The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-contractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give 'the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers

> of the Act.' Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants." (Footnote omitted.)

The Court, after observing that in a broad, generic sense, a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor but under the more technical meaning as established by usage in the building trades, a subcontractor "is one who performs for and takes from the prime contractor, a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen," held that "the word, 'subcontractor' was used in its technical sense so as to exclude laborers and materialmen" (322 U.S. at 109, 110).

By virtue of the proviso of Section 2(a) of the Act, Tompkins was denied the right to sue on the bond.

In *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116 (1974), the question was whether Cerpac Company, which had two contracts directly with Rich, the prime contractor, was a subcontractor as to the exterior standard plywood contract.[4] Cerpac bought the plywood from Industrial Lumber Co., which was the use-plaintiff. However, Cerpac "was closely intertwined with Rich. The principals of Rich held a substantial voting interest in Cerpac's stock, supplied a major share of its working capital and were thoroughly familiar with its operations and financial condition." Some invoices from Industrial for the plywood went

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[4] Cerpac was a subcontractor for the furnishing and installing of the custom millwork.

directly to Rich.' The Court looked at the total relationship between Cerpac and Rich, including the close interrelationship between the management and financial structures of the two companies, and said:

> "Cerpac was, as the Court of Appeals observed, 'in a special, integral, almost symbiotic relationship [with] Rich.' 473 F2d, at 724. It would have been easy for Rich to secure itself from loss as a result of a default by Cerpac."

In effect, the corporate veil was pierced, and Cerpac was considered to be the *alter ego* of Rich. The Court again stated that the rights created by the Miller Act were limited by the proviso of Section 2(a).

The facts in *MacEvoy* and *Rich* are far different from those in the instant case, and the holdings of this Court in those cases are no support for the judgment below.

The remarks in the decision of the Court below in the "Opinion for the Court" (551 F. 2d, at 1285):

> "Like the Heard Act which it replaced, the Miller Act carried forward settled congressional policy to ensure that those who aided in the completion of Government projects would not be financially injured by the default of a contractor who happened to be low bidder for a contract."

and the statement in the concurring opinion (551 F. 2d, at 1287):

> "Thus the congressional intent is 'to protect those whose labor and materials go into public projects' because such costs are not recoverable against the United States."

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[1] Similar to *Continental Casualty Co.* v. *North American Cement Corp.*, 67 App. D.C. 234, 91 F. 2d 307 (1937), cited in fn. 3 in *MacEvoy*.

seem to disregard not only the proviso of Section 2(a) of the Miller Act limiting the right of action on the bond to a specific class of persons, but also the decisions of this Court and those of other federal courts, *supra*.

The payment bond does not "ensure" payment of accounts receivable of any and all, no matter how far removed downward from the contractor or outward to remote persons—financiers, remote material or equipment suppliers, and so on. The outer limits of vicarious liability on the payment bond under the approach of the Court of Appeals are undefined and would be difficult even to envisage.

The Prime Contractor, as a Principal on the Payment Bond, Suffers the Loss from the Results of Extensions of Vicarious Liability Transcending the Limits of the Miller Act.

The prime contractor is the principal on the Miller Act payment bond and is obliged to exonerate its surety from liability thereunder and to indemnify and to reimburse the surety for all its loss and expense, including attorneys' fees, incurred by reason of the execution of that bond. Suretyship is not insurance. *Pearlman* v. *Reliance Insurance Co.*, 371 U.S. 132, 139, 140, footnote 19 (1962).

Furthermore, it is a matter of common knowledge that many small business contractors, in order to obtain bonding capacity necessary to bidding on and to obtaining awards of contracts on federal construction projects, need to have, in addition to the corporate indemnification of the surety, individual indemnitors of the surety, such as officers and stockholders of the company. See *Carroll* v. *National Surety Co.*, 58 App.

D.C. 3, 24 F. 2d 268 (1928); *Transamerica Insurance Co.* v. *Bloomfield*, 401 F. 2d 357 (CA6, 1968).

It is also a matter of public knowledge that there has been great emphasis on the awards of construction contracts to small businesses and the aggregate amount of such contracts on federal projects which permit a small business qualify for awards has escalated. The total volume of small business federal construction contracts is great. A loss to small business contractors, by extension of vicarious liability beyond the plain provisions of the Miller Act potentially bringing about double payment or long and expensive defensive litigation,[8] can impair working capital, work a loss of bonding capacity in whole or in part, and effectively put a small business contractor out of business.[9]

[8] *Cf. U.S.* v. *Monaco and Son, Inc.*, 336 F. 2d 636 (CA4, 1964).

[9] The one-year limitation in Section 2(b) of the Miller Act is for the benefit of the contractor, because its expiration marks the end of the contractor's liability. Thus, a contractor with but modest bonding capacity can bid on new projects because the expiration of the one-year period with no claims against the contractor restores or renews the bonding capacity.

CONCLUSION

The decisions and judgment below contravene the limitations pertaining to the class entitled to sue on the payment bond under Section 2(a) of the Miller Act and the authoritative decisions thereunder. Accordingly, it is urged that the judgment below be reversed.

Respectfully submitted,

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EXHIBIT

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74TH CONGRESS

1st Session

HOUSE OF REPRESENTATIVES

REPORT No. 1263

Bonds of Contractors on Public Works

JUNE 19, 1935.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

MR. MILLER, from the Committee on the Judiciary, submitted the following

Report

[To accompany H.R. 8519]

The Committee on the Judiciary, having considered H.R. 8519, requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work, reports the same favorably to the House with the recommendation that it do pass.

This proposed legislation supersedes the Heard Act, which it repeals, dealing with bonds of contractors on public works. After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, particularly from subcontractors who have experienced in many cases what seems to your committee to be undue delay, with resultant hardships, in the collec-

tion of moneys due them by suits on bonds under the procedure prescribed by the Heard Act, the committee appointed a subcommittee to consider all of a number of proposed amendments which had been introduced in the House and referred to the committee. Extensive hearings were held by the subcommittee, at which representatives of contractors, surety companies, and the Government were heard.

The Treasury Department expressed its accord with the purpose sought to be accomplished in the following language contained in a letter dated March 23, 1935, addressed by the Secretary to the chairman of the committee with regard to H. R. 2068, one of the bills considered by the subcommittee, and which is superseded by the reported bill, H. R. 8519:

The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law.

Procedure With Existing Law

The Heard Act is set out in full at the end of this report in compliance with the Ramseyer rule. It will be observed that under this act, there is but one bond provided by the contractor, which serves as protection both for the United States and for subcontractors, material men, and laborers.

If suit is brought by the United States on the bond other claimants may intervene and have their claims adjudicated, subject to the priority of the United States. If, however, no suit is brought on the bond by the United States, the claimants must wait until 6 months after the completion and

final settlement of the contract before they may initiate suit. In the case of works requiring a long period of time to complete, this may mean a delay of years before the subcontractors, material men, and laborers are even permitted to bring suit on the bond, and months more of delay occur before judgment is entered. Under such circumstances it appears that claimants frequently find themselves under the necessity of choosing whether they will wait years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitableness of the contract. Those in financial stringency, of course, have no choice but the latter alternative.

Procedure Under H. R. 8519

Under this bill the contractor on all contracts of more than $2,000 will furnish two bonds:

(*a*) A performance bond satisfactory to the officer of the Government awarding the contract in such amount as he shall deem adequate for the protection of the United States; and

(*b*) A payment bond for the protection of all persons furnishing labor or material in the prosecution of the work provided for in such contract. The amount of the payment bond is determined by the amount of the contract, as follows:

Contract:	Bond
Not more than $1,000,000	One-half of amount of contract.
Between $1,000,000 and $5,000,000	40 percent of amount of contract.
Over $5,000,000	$2,500,000.

The right to sue on the payment bond and prosecute his action to judgment and execution accrues to any person

protected by the bond 90 days after the last of his labor was performed or material supplied if he has not been paid within that time. The suit must be brought in the district court of the district where the contract was to be performed and may not be commenced after the expiration of 1 year from the date of final settlement of the contract.

One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. "Equity aids the vigilant."

A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond.

In compliance with clause 2a of rule XIII, existing law which it is proposed to repeal is set out in full below:

UNITED STATES CODE, TITLE 40, SECTION 270

Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials: Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public

building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claim and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto

within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.